No. 94-102

In the Supreme Court of the United States

OCTOBER TERM, 1994

BORDEN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioner consolidated the operations of two of its dairy plants, each of which was covered by a separate union contract. The question presented is whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), when it unilaterally terminated the contract covering one of the plants and applied to the employees transferred from that plant the contract covering the other plant, while it was engaged in negotiations with the union for a new contract to cover the consolidated operation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Armour & Co., 40 N.L.R.B. 1333 (1942)	5
Central Soya Co., 281 N.L.R.B. 1308 (1986), aff'd, 867 F.2d 1245 (10th Cir. 1988)	13
Central Soya Co. v. *NLRB*, 867 F.2d 1245 (10th Cir. 1988)	12
Federal-Mogul Corp., 209 N.L.R.B. 343 (1974)	5, 6, 10
Globe Machine & Stamping Co., 3 N.L.R.B. 294 (1937)	5
Harte & Co., 278 N.L.R.B. 947 (1986)	13
James B. Beam Distilling Co. v. *Georgia*, 501 U.S. 529 (1991)	16
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994)	16
May Dep't Stores v. *NLRB*, 326 U.S. 376 (1945)	8
NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972)	11, 15
NLRB v. *Katz*, 369 U.S. 736 (1962)	8
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	17
Westwood Import Co., 251 N.L.R.B. 1213 (1980), enforced, 681 F.2d 644 (9th Cir. 1982)	15

Statutes and regulation: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 4, 5, 7, 14
§ 8(a)(3), 29 U.S.C. 158(a)(3) 7, 14
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 4, 5, 7
29 C.F.R. 102.19(a) 17

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-102

BORDEN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 19 F.3d 502. The decision and order of the National Labor Relations Board (Pet. App. 28a-44a), including the decision of the administrative law judge (Pet. App. 45a-99a), is reported at 308 N.L.R.B. 113.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1994. A petition for rehearing was denied on April 18, 1994. Pet. App. 100a-101a. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the production and sale of milk products. Pet. App. 47a. On or about October 9, 1986, petitioner purchased a dairy facility in Salt Lake City, Utah, known as the "Meadow Gold" plant, from an investment firm that had acquired the assets of Beatrice Foods, Inc. (Beatrice). *Id.* at 4a, 49a. At the time of the purchase, Beatrice was in the process of negotiating a labor contract with Local 222 of the International Brotherhood of Teamsters (Union), which represented the Meadow Gold employees. Petitioner replaced Beatrice in those negotiations and entered into a collective bargaining agreement with the Union covering the Meadow Gold plant, effective May 1, 1987 through November 1, 1990. *Id.* at 4a, 49a-50a.

On November 6, 1987, petitioner purchased a second dairy facility in Salt Lake City, known as the "Farmer Jack" plant, from Borman Acquisition Corporation (BAC). Pet. App. 52a. Prior to petitioner's purchase, the Union, which also represented the Farmer Jack employees, had entered into a labor contract with BAC covering the Farmer Jack plant, effective April 10, 1987 through April 30, 1992; the contract contained substantial monetary concessions by the Union. *Id.* at 4a, 50a-51a. On November 7, 1987, the day following the purchase, petitioner began operating the Farmer Jack plant, retaining all of BAC's employees. *Id.* at 52a. On November 10, petitioner met with the Union to confirm that it had purchased and was operating the Farmer Jack plant, and that it recognized the Union as the collective representative of the employees working at the Farmer Jack plant. Petitioner also advised the Union that it planned to close the Meadow Gold plant, to consolidate the Meadow Gold and Farmer Jack operations at the Farmer Jack plant, and to

assume and apply the Farmer Jack contract at the Farmer Jack plant. *Id.* at 5a, 53a.

On November 12, 1987, the Union requested negotiations with petitioner respecting "the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale." Pet. App. 53a. The Union also requested petitioner not to alter the Farmer Jack contract unilaterally pending completion of negotiations. *Ibid.* On January 5 and 6, 1988, petitioner and the Union opened negotiations for a new labor contract to cover the Farmer Jack plant, including an agreement respecting the transfer of Meadow Gold employees to the Farmer Jack facility. No agreement was reached during these negotiating sessions, or at further sessions conducted in March, May, and October 1988. *Id.* at 5a, 53a-55a.

In October 1988, petitioner ceased production at the Meadow Gold plant. Meadow Gold employees either took early retirement or were laid off. Pet. App. 5a, 60a-62a. Petitioner, however, selectively transferred some Meadow Gold employees to the Farmer Jack plant by rehiring them as "new" employees performing the same or similar jobs, without seniority rights accrued under the Meadow Gold contract. *Id.* at 5a, 61a. As of October 7, 1988, the bargaining unit at the Farmer Jack plant consisted of 35 former Meadow Gold employees, 31 original Farmer Jack employees, and 13 employees hired "off the street" since petitioner's purchase of the plant from BAC. *Id.* at 61a. Petitioner applied the terms of the concessionary Farmer Jack contract to all of the employees in the bargaining unit, including the 35 former Meadow Gold employees. *Id.* at 5a-6a, 32a.

2. a. On June 15, 1989, the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint alleging, among other things, that petitioner violated Section 8(a)(5) and (1) of the National

Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), by unilaterally implementing the Farmer Jack contract as to the Meadow Gold employees that petitioner had transferred to the Farmer Jack plant after the closure of the Meadow Gold plant. Pet. App. 6a-7a & n.3. After a hearing, an administrative law judge (ALJ) dismissed that portion of the complaint. *Id.* at 77a. The ALJ found, first, that the Farmer Jack unit was not an accretion to the Meadow Gold unit, thus rejecting the Union's contention that petitioner was required to apply the Meadow Gold contract to all the Farmer Jack employees. *Id.* at 65a. The ALJ observed that "[w]hile new to [petitioner], the Farmer Jack facility was * * * an existing operation which had been owned by two previous entities and was taken over by [petitioner] as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating." *Ibid.*

The ALJ found merit in the General Counsel's contention that petitioner's obligation to maintain the status quo, pending negotiations for a new contract covering the Farmer Jack plant, required it to continue to apply the Meadow Gold contract to the transferred Meadow Gold employees until the parties reached a new contract or impasse. Pet. App. 75a. Moreover, the ALJ found that no such impasse had occurred, as "[petitioner's] implementation of the [Farmer Jack] contract was a course of conduct undertaken from the time of its acquisition of the [Farmer Jack] facility and was not initiated after some later argued impasse in bargaining." *Id.* at 69a. Nevertheless, the ALJ declined to hold that petitioner's application of the Farmer Jack contract to the transferred Meadow Gold employees violated Section 8(a)(5) and (1) because, in his view, to require petitioner to maintain a "bifurcated" status quo, pending negotiation of a new agreement for the Farmer

Jack plant, would "expand[ ] [the] reach" of the Act. Pet. App. 76a.

b. The Board affirmed the ALJ's factual findings, but reversed the dismissal of the complaint, concluding instead that petitioner had violated Section 8(a)(5) and (1) by unilaterally applying the Farmer Jack contract to the transferred Meadow Gold employees. Pet. App. 30a n.4, 36a. The Board held that "where two separate units of the same employer represented by the same union contribute substantial proportions of employees to a new unit, an employer is obligated to preserve the status quo with respect to each of the two groups until it reaches either a new agreement or a bargaining impasse." *Id.* at 35a. Drawing on an analogy to its decision in *Federal-Mogul Corp.*, 209 N.L.R.B. 343 (1974), the Board explained that its holding was "substantially consistent with the manner in which the Board has treated the obligation of an employer respecting the terms and conditions of previously unrepresented employees who are added to a bargaining unit as a result of an *Armour-Globe* election during the term of a collective-bargaining contract covering the larger unit." Pet. App. 34a (footnote omitted).[1] The Board observed that, in such a situation, "[t]he newly added, or 'fringe group,' employees are not automatically swept under the terms of the agreement covering the existing unit * * *. Rather, the union and the employer bargain over

---

[1] In an "*Armour-Globe*" election, unrepresented employees decide whether to include themselves in a bargaining unit that has already selected union representation and is covered by a labor agreement. See *Armour & Co.*, 40 N.L.R.B. 1333, 1334-1337 (1942); *Globe Machine & Stamping Co.*, 3 N.L.R.B. 294, 299-300 (1937). In *Federal-Mogul*, the Board held that the employer violated Section 8(a)(5) of the Act by unilaterally imposing a labor contract covering an existing unit on previously unrepresented employees who voted for inclusion in that unit. 209 N.L.R.B. at 343.

the terms and conditions under which the fringe group will work until the contract in the larger unit expires, and the status quo from which they bargain is the current working conditions of those employees." *Ibid.*

The Board rejected petitioner's contention that to require it to maintain a bifurcated status quo while bargaining to agreement or impasse would create industrial unrest. The Board explained that "our experience and judgment leads us to conclude that [a bifurcated status quo rule] is more likely to prompt both parties to negotiate an agreement expeditiously" because "each will be motivated to reach agreement to forestall the continued application of the contract that each party views as the less desirable one." Pet. App. 36a.[2] While the Board acknowledged that, in some circumstances, there may be a practical justification for not requiring the employer to maintain a bifurcated status quo while negotiating a single contract for the unit, *ibid.*, the Board concluded, "here * * * we see no 'legal or practical justification for permitting either party to escape its normal bargaining obligation,' which is to bargain with the employees' previous conditions of employment as the starting point." *Id.* at 35a (quoting *Federal-Mogul Corp.*, 209 N.L.R.B. at 344). The Board explained:

> Maintaining the status quo by requiring the terms of both contracts to remain in effect after a consolida-

---

[2] The Board also rejected petitioner's contention that to maintain a bifurcated status quo, even for a limited period of bargaining, would present the union with a conflict of interest because different segments of the bargaining unit would enjoy different wages and benefits. Pet. App. 36a. The Board noted that "this situation [is] at least comparable to the dual-tier bargaining structures which have been routinely advanced as employer proposals in numerous industries and have frequently thereafter been agreed to and administered by unions without disqualifying conflicts of interest." *Ibid.*

> tion, such as the one that occurred here, promotes the statutory interest of stability in collective bargaining. Maintaining the status quo ensures that both portions of the merged unit begin from the same relative point. Like any employees in a pre-bargaining posture, they both enter negotiations with their respective preexisting terms and conditions of employment intact.

Pet. App. 35a.

To remedy petitioner's violation of Section 8(a)(5) and (1), the Board ordered petitioner to rescind any departures from the terms and conditions of employment that had been applicable to the transferred Meadow Gold employees prior to their transfer, to make them whole for any loss of earnings or other benefits suffered as a result of those departures, and to bargain with the Union. Pet. App. 40a.[3]

3. The court of appeals enforced the Board's order. Pet. App. 27a. The court concluded that "the Board's solution—to maintain the status quo and hold [petitioner] to the terms of the [collective bargaining agreements] to which it had voluntarily agreed," pending negotiation of a new contract to cover all the employees at the Farmer Jack

---

[3] The Board, in agreement with the ALJ, also found that petitioner violated Section 8(a)(5) and (1) of the Act by promising certain Meadow Gold employees increased benefits if they abandoned the Union, and by threatening to lay off or to refuse to transfer Meadow Gold employees to the Farmer Jack plant unless the Union accepted petitioner's last bargaining offer. Pet. App. 30a n.4, 79a, 89a. Petitioner did not challenge these findings in the court of appeals. The Board further found that the Meadow Gold employees who took early retirement, rather than accept employment under the terms and conditions of the Farmer Jack contract, were constructively discharged in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). Pet. App. 36a-37a. The court of appeals upheld that finding, *id.* at 27a, and petitioner does not challenge it here. Pet. 8-9 n.7.

plant, "neatly balances the interests of the employer, the employees, and the National Labor Relations Act." *Id.* at 18a. Further, the court affirmed the ALJ's findings that the Farmer Jack unit was not an accretion to the Meadow Gold unit, and that negotiations for a new agreement to cover the Farmer Jack plant never reached impasse. *Id.* at 13a, 27a. Finally, the court rejected petitioner's contention that the Board's decision created a "new" rule that should not be applied "retroactively" to its conduct. The court concluded that "the question of retroactivity does not arise in the present case," for the Board did not overrule a controlling precedent upon which petitioner had relied to its detriment, "[t]here was never any legal justification for [petitioner's] application of the [Farmer Jack] contract to the Meadow Gold employees," and "[t]he Board's order merely recognizes this fact." *Id.* at 19a.

ARGUMENT

1. It is well settled that the National Labor Relations Act (Act) requires an employer to maintain the status quo during negotiations for a new contract with the union representing its employees. See *NLRB* v. *Katz,* 369 U.S. 736, 743 (1962); *May Dep't Stores* v. *NLRB,* 326 U.S. 376, 385 (1945). This case involves merely the application of that principle to a new set of circumstances. The National Labor Relations Board (Board) was required to decide *what is* the status quo that must be maintained "where two separate units of the same employer represented by the same union contribute substantial proportions of employees to a new unit." Pet. App. 35a. The Board reasonably determined that, in such a case, the employer must continue to apply to the transferred employees the terms and conditions of the contract that had governed those employees until it concludes a new contract with the union or

reaches a bargaining impasse. That determination is entirely consistent with the Act.

Before the Board, petitioner attempted to justify its unilateral application of the Farmer Jack contract to the Meadow Gold transferees on the ground that "the former [Farmer Jack] contract in effect at Farmer Jack constitute[d] the status quo for the combined unit of employees." Pet. App. 33a. The Union, taking a diametrically opposed view of petitioner's obligations under the Act, contended that petitioner was required to apply the Meadow Gold contract to all of the employees, including the Meadow Gold transferees, because the Farmer Jack unit was an accretion to the Meadow Gold unit. *Id.* at 62a. The Board rejected both of the extremes urged by petitioner and the Union, and adopted instead a middle position, under which petitioner is required to apply the Meadow Gold contract to the transferred Meadow Gold employees, and the Farmer Jack contract to the original Farmer Jack employees, pending the negotiation of a new agreement covering the new consolidated operation at the Farmer Jack plant, or until the parties reach a bargaining impasse. *Id.* at 35a. As the Board explained (*ibid.*), maintaining the status quo "promotes the statutory interest of stability in collective bargaining" by ensuring that "both portions of the merged unit * * * enter negotiations with their respective preexisting terms and conditions of employment intact."

The court of appeals, recognizing that the Board's rule is entitled to deference if it constitutes a reasonable and defensible interpretation of the Act (Pet. App. 12a), concluded that "the Board's solution—to maintain the status quo and hold Borden to the terms of the [collective bargaining agreements] to which it had voluntarily agreed—neatly balances the interests of the employer, the employees, and the National Labor Relations Act." *Id.* at 18a.

2. Petitioner asserts (Pet. 10) that the Board's bifurcated status quo requirement is inconsistent with the principle of majority rule, which is the cornerstone of national labor policy, for a corollary of that principle is that "where two or more separate units of employees are merged due to a corporate change, *e.g.*, merger, the new, single contingent of employees is governed by one set of terms and conditions of employment, as determined by the majority." Since the transferred Meadow Gold employees constituted less than a numerical majority at the Farmer Jack plant after the consolidation (35 of 79 employees), petitioner argues that it was entitled to apply the existing Farmer Jack contract to all the employees at that plant, including the Meadow Gold transferees. There is no merit to that contention.

a. As the Board recognized (Pet. App. 34a-35a), this case is analogous to the situation in which unrepresented employees choose to become part of a bargaining unit that is already represented by a union and covered by a collective bargaining agreement. In such a case, the newly added employees are not automatically swept under the terms of the agreement covering the existing unit; rather, the union and the employer bargain over the terms and conditions of the new employees while maintaining the status quo of the current conditions of those employees. See *ibid.*; *Federal-Mogul Corp.*, 209 N.L.R.B. 343 (1974). In both cases, "when it comes time to negotiate a new contract, the Union and the Employer must bargain for a single contract to cover the entire unit" (*Federal-Mogul Corp.*, 209 N.L.R.B. at 344), but in the interim, the employer "must deal with the problems of each * * * group" (*id.* at 345), and this approach "is to be preferred, both legally and practically, over automatically lifting the new group, sans bargaining, into a fixed mold no matter how badly

that mold may fit either the employees' or the employer's circumstances" (*ibid.*).

Contrary to petitioner's contention (Pet. 10-11), *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), does not suggest a different result. In *Burns*, the Court held that, while Burns was a successor to Wackenhut (a majority of Burns's workforce consisting of former Wackenhut employees) and was thus obligated to recognize and bargain with the union representing Wackenhut's employees, Burns was not bound by the substantive provisions of Wackenhut's labor contract to which Burns did not consent. Petitioner argues (Pet. 11) that, since Burns was not obligated to maintain separate terms and conditions of employment for the Wackenhut group and the Burns group of employees, "[t]he upshot of *Burns* is that one set of terms and conditions of employment, as determined by the majority through collective bargaining, would apply to all of Burns' employees."

Petitioner's reading of *Burns* is incorrect. *Burns* held only that the successor corporation was free to negotiate a new contract for the employees obtained from Wackenhut, and the Court did not address the point raised by petitioner here. In *Burns*, the Court stated that, where it was "perfectly clear" that a successor intended to take over the predecessor's work force, the successor was not free to change the existing terms and conditions without bargaining with the union (406 U.S. at 294-295), but the Court did not address the question of what would constitute those existing terms and conditions in a particular case. As the court of appeals pointed out here (Pet. App. 16a), "[petitioner], in fact, had an opportunity to renounce the [contract] negotiated by its predecessor[ ]" under *Burns* when it acquired the Meadow Gold plant. Petitioner nevertheless chose to negotiate a new contract with the Meadow Gold

employees, and nothing in *Burns* authorized it to dishonor a contract that it negotiated.

Nor is petitioner aided by *Central Soya Co.* v. *NLRB,* 867 F.2d 1245 (10th Cir. 1988) (Pet. 11). There the employer, which operated a unionized feed mill, acquired a nonunion feed mill, transferred the unionized employees to the nonunionized plant, and announced that the consolidated facility would be run as a nonunion operation, refusing to recognize the union or honor the union contract following the consolidation. 867 F.2d at 1246. The court, in agreement with the Board, held that the nonunion employees were an accretion to the unit of unionized employees because the nonunion employees "did not perform different operations, use different types of specialized equipment, function in different work areas, or fall under different supervision" (*id.* at 1248), and their addition did not "numerically overshadow the existing bargaining unit" since the unionized employees comprised a majority of the employees in the consolidated unit (*id.* at 1248-1249).

Petitioner asserts (Pet. 11) that *Central Soya* demonstrates that "one set of terms and conditions of employment, as determined by the majority, apply to all employees in the same unit." Petitioner overlooks the fact that, unlike *Central Soya,* this case does not involve the accretion of one group of employees, without a history of bargaining on its own, into another unit of employees. Here, the ALJ, affirmed by both the Board and the court of appeals (Pet. App. 13a, 30a n.4), found that the Farmer Jack unit was not an accretion to the Meadow Gold unit, for "the Farmer Jack unit was not simply a new unit of employees without a history of collective bargaining or a separate identity of its own," but rather was "an existing operation which had been owned by two previous entities

and was taken over by [petitioner] as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating." *Id.* at 65a.

Petitioner's reliance (Pet. 12) on *Harte & Co.*, 278 N.L.R.B. 947 (1986), is similarly misplaced. In that case, the employer relocated its operation to a new facility, and it transferred a sufficient number of its employees, who were covered by a union contract, to the new facility such that they comprised 40 percent of the workforce there; the remainder of the employees at the new facility were not represented by a union. *Id.* at 947-948. The Board held that the employer lawfully applied the union contract to its entire work force, explaining: "[A]n existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement." *Id.* at 948. Even if the principle enunciated in *Harte* were applicable to plant consolidations (but see *Central Soya Co.*, 281 N.L.R.B. 1308, 1309 n.6 (1986), aff'd, 867 F.2d 1245 (10th Cir. 1988)), that principle requires substantial similarity between the operations involved; here, as the ALJ found, the consolidated operation at the Farmer Jack plant was different from, not substantially similar to, either preconsolidation operation. Pet. App. 66a-67a.

Finally, there is no support for petitioner's contention (Pet. 12-13) that, where the employer's organizational change "does not fit neatly" into the category of "an accretion or relocation," the "implication is that the employer can choose which one set of terms and conditions of employment should apply to all employees subject, of course, to the bargaining process[.]" In particular, the excerpt from the Board's Division of Advice memorandum, cited

by petitioner (Pet. 12 n.9),[4] concluded only that, because the original Farmer Jack unit was not an accretion to the Meadow Gold unit, petitioner did not violate the Act by declining to apply the Meadow Gold contract to the Farmer Jack employees. But, since the memorandum did not address the different question considered by the Board—namely, whether the Farmer Jack contract could lawfully be applied to the Meadow Gold transferees, pending negotiation of a new contract for the consolidated operation—there is no warrant for petitioner's inference that it believed it would be free to apply the Farmer Jack contract to everyone.

b. Even if there were merit to petitioner's contention that, as a general proposition, an employer that consolidates two units may unilaterally disregard the contract covering the transferees if they constitute a minority of the newly consolidated operation, that principle would not govern this case. It was only by virtue of petitioner's unlawful conduct that the Meadow Gold employees were in the minority. The Board found (Pet. App. 36a-37a), and petitioner concedes (Pet. 8 n.7), that those Meadow Gold employees who elected to take early retirement, rather than accept a transfer to the Farmer Jack plant and subject themselves to the reduced wages and benefits mandated by the Farmer Jack contract, were constructively discharged in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). But for the unlawful discharges, petitioner would not have hired 13 employees "off the street" to work at the Farmer Jack plant, and, absent those hires, original Farmer Jack employees would have constituted only a minority of the employees (31 of 79) at the Farmer Jack plant. Under these circumstances, petitioner was not free, even under its hypothesis, uni-

---

[4] The memorandum is discussed further, pp. 16-17, *infra*.

laterally to apply the Farmer Jack contract to all of the employees. Cf. *Westwood Import Co.*, 251 N.L.R.B. 1213, 1215-1216 (1980), enforced, 681 F.2d 644 (9th Cir. 1982).

3. There is no merit to petitioner's contention (Pet. 13) that the Board's bifurcated status quo rule is inconsistent with this Court's admonition in *Burns* (406 U.S. at 288) that "[t]he congressional policy manifest in the Act is * * * to allow the balance of bargaining advantage to be set by economic power realities." Far from "skew[ing] the starting point for negotiations" (Pet. 14), the Board's rule furthers that very policy. Petitioner's predecessor possessed sufficient economic power to exact concessionary terms from the Union at the Farmer Jack plant, but the Union possessed sufficient economic power to demand relatively more generous terms from petitioner at the Meadow Gold plant. Petitioner would require the Union to surrender the gains achieved at the Meadow Gold plant even before the start of negotiations for a new agreement. Such a result would be contrary to the policies of the Act, for, as the Court observed in *Burns*, "[s]trife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." 406 U.S. at 288.

Equally wide of the mark is petitioner's contention (Pet. 17-18) that, contrary to the teaching of *Burns*, the Board's rule "saddles [petitioner] with a collective bargaining agreement negotiated under circumstances which it determined were no longer financially feasible." Petitioner itself negotiated the Meadow Gold contract in May 1987 and agreed to an expiration date of November 1, 1990. Pet. App. 50a. Petitioner subsequently concluded, when it acquired the Farmer Jack plant, that the terms it assented to in the Meadow Gold contract were not, in hindsight, so

advantageous as it might have wished; that, however, is not a lawful basis for it to dishonor the Meadow Gold contract in mid-term. Moreover, the Board's status quo rule does not require petitioner to honor the Meadow Gold agreement until its expiration date, but only for a limited period of bargaining or until the parties reach impasse in negotiations for a new contract. *Id.* at 35a.

4. There is no substance to petitioner's contention (Pet. 25-29) that the Board improperly applied a "new" rule to it retroactively in this case. The court of appeals correctly concluded that "the question of retroactivity does not arise in the present case." Pet. App. 19a. As the court pointed out, *Central Soya,* the decision which petitioner invoked to justify its unilateral rejection of the Meadow Gold contract, "simply is inapposite"; "[t]he Board has not overruled any controlling precedent upon which [petitioner] relied to its detriment," and petitioner never had any legal justification for applying the Farmer Jack contract to the Meadow Gold employees. *Ibid.* In short, the court properly characterized the Board's decision as "clearly * * * an attempt to fill a void created by the unprecedented factual situation * * * not an abrupt departure from well-established practice." *Id.* at 21a.[5]

There is also no merit to petitioner's suggestion (Pet. 27) that the Board's bifurcated status quo rule should not be applied to it in this case because it relied, during the latter half of the consolidation process, on a July 1988 memo-

---

[5] Petitioner's reliance (Pet. 29) on this Court's decision in *Landgraf* v. *USI Film Products,* 114 S. Ct. 1483, 1497 (1994), in support of a "presumption against retroactivity," is misplaced. *Landgraf* addressed the retroactive application of a new statute, not a judicial or administrative determination of federal law existing at the time of the conduct at issue. Cf. *James B. Beam Distilling Co.* v. *Georgia,* 501 U.S. 529, 535 (1991) (opinion of Souter, J.) (retroactive application of judicial decisions is "overwhelmingly the norm").

randum prepared by the Board's Division of Advice, which recommended that the Regional Director decline to issue a complaint respecting petitioner's rejection of the Meadow Gold contract. Pet. App. 114a-115a. Any such reliance on that memorandum by petitioner was legally unjustified. The Board's procedural rules provide that "[i]f, after a charge has been filed, the regional director declines to issue a complaint * * * [t]he person making the charge may obtain a review of such action by filing an appeal with the general counsel." 29 C.F.R. 102.19(a). After the Regional Director dismissed the Union's charge, the Union filed an appeal, and the General Counsel remanded the charge to the regional office for additional investigation in October 1988, thus making it clear to petitioner that the issue had not been definitively resolved. See Gov't C.A. Br. 25. No reasonable employer was entitled to conclude, in those circumstances, that its course of conduct had been determined to be proper under the Act.[6]

---

[6] Petitioner raises a number of other meritless contentions. First, petitioner states (Pet. 21) that, "[t]o the extent that the Tenth Circuit holds that an employer must implement every term of its last offer for its unilateral action to be lawful, its decision is plainly contrary to existing federal law." That issue is not presented here. First, the court evaluated petitioner's conduct under the standard that "an employer has the right to implement all or *part* of its final offer with respect to a mandatory subject of bargaining upon an impasse in negotiations." Pet. App. 24a (emphasis added). Second, the court also found that the parties never reached impasse. *Id.* at 27a. Petitioner's further contention (Pet. 23) that substantial evidence does not support the court's finding raises a fact-bound issue that does not merit review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Lastly, petitioner incorrectly asserts (Pet. 23) that the court of appeals misconstrued the ALJ's finding respecting the effect of the Union's November 12, 1987 letter requesting petitioner not to alter the Farmer Jack contract unilaterally pending negotiations for a new agreement. The ALJ did not, as petitioner contends, find that the letter amounted

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

SEPTEMBER 1994

---

to a waiver of the Union's right to object to petitioner's rejection of the Meadow Gold contract. Had the ALJ so construed the letter, there would have been no occasion for him to reach the General Counsel's contention that petitioner was required to maintain a bifurcated status quo in the circumstances of this case. Pet. App. 72a-77a.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-157/86207